

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

BENJAMIN ACOSTA NEVAREZ,

Plaintiff,

v.

No. 16cv1323 MV/SMV

ERIC K. FANNING, Secretary of the Army,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**DENYING MOTION TO PROCEED *IN FORMA PAUPERIS***

**THIS MATTER** comes before the Court on *pro se* Plaintiff Benjamin Acosta Nevarez's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 2, filed December 5, 2016 ("Application"). For the reasons stated below, the Court will **DENY** Plaintiff's Application. Plaintiff shall have 21 days from entry of this Order to pay the \$400.00 fee<sup>1</sup> for instituting a new case or show cause why this case should not be dismissed without prejudice for failure to pay the filing fee. Failure to timely pay the filing fee or show cause may result in dismissal of this case without prejudice.

***Application to Proceed in forma pauperis***

The statute for proceedings *in forma pauperis*, 28 U.S.C. § 1915(a), provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

When a district court receives an application for leave to proceed in forma pauperis, it should examine the papers and determine if the requirements of [28 U.S.C.] § 1915(a) are satisfied. If they are, leave should be granted. Thereafter,

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<sup>1</sup> The fee for instituting any civil action, suit or proceeding is comprised of a \$350.00 filing fee, *see* 28 U.S.C. §1914, and a \$50.00 administrative fee.

if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.]

*Menefee v. Werholtz*, 368 Fed.Appx. 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962)). While the Court should not deny a person the opportunity to proceed under 28 U.S.C. § 1915(a) simply because he or she is not “absolutely destitute,” the Court may deny permission for a person to proceed IFP where his or her monthly income exceeds his or her monthly expenses by an amount greater than the filing fee. *See Brewer v. City of Overland Park Police Department*, 24 Fed.Appx. 977, 979 (10th Cir. 2002) (litigant whose monthly income exceeded his monthly expenses by a few hundred dollars according to his own accounting appeared to have sufficient income to pay filing fees, and, thus, was not entitled to IFP status).<sup>2</sup>


The Court will deny Plaintiff’s Application to Proceed in District Court Without Prepaying Fees or Costs. Plaintiff states that: (i) his and his spouse’s combined monthly income is \$6,243.00; (ii) their combined monthly expenses are \$3,990.00; and (iii) he has \$5,000.00 in his checking/savings account. It appears, by his own accounting, that Plaintiff is presently able to pay the \$400.00 fee for instituting a new case because his and his spouse’s combined monthly income exceeds their monthly expenses by \$2,253.00.

Plaintiff shall have 21 days from entry of this Order to pay the \$400.00 fee for instituting a new case or show cause why this case should not be dismissed without prejudice for failure to pay the filing fee. Failure to timely pay the filing fee or show cause may result in dismissal of this case without prejudice.

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<sup>2</sup> At the time of the ruling in *Brewer*, the filing fee for the appeal was \$100.00. *See* 28 U.S.C.A. § 1913 (2001) Judicial Conference Schedule of Fees. *Brewer*’s monthly income exceeded his monthly expenses by \$242.00. *See* Appellant’s Motion for Leave to Proceed on Appeal Without Prepayment of Costs or Fees at 3-7, *Brewer v. City of Overland Park Police Department*, No. 01-3055 (10th Cir. May 11, 2001).

**IT IS ORDERED THAT** Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 2, filed December 5, 2016, is **DENIED**. Plaintiff shall have 21 days from entry of this Order to pay the \$400.00 fee case or show cause why this case should not be dismissed without prejudice for failure to pay the filing fee.

  
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**MARTHA VAZQUEZ**  
**UNITED STATES DISTRICT JUDGE**